REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

CE CEBU GEOTHERMAL POWER COMPANY, INC.,
Respondent.

C.T.A. EB No. 426
(C.T.A. Case Nos. 6791 & 6836)

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CE CEBU GEOTHERMAL POWER COMPANY, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB No. 427
(C.T.A. Case Nos. 6791 & 6836)

Present:

Acosta, P.J.,
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Palanca-Enriquez, JJ.:

Promulgated:
MAY 29 2009 9:00 a.m.

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DECISION

BAUTISTA, J.:

The Case

Before Us are two Petitions for Review filed pursuant to Section 18 of Republic Act 1125, as amended by Section 11 of Republic Act 9282. The first petition,

docketed as C.T.A. EB No. 426, was filed by the Commissioner of Internal Revenue,[1] who is seeking the reversal of the Decision[2] dated May 15, 2008 and the Resolution dated October 6, 2008 of the Second Division of this Court ("Court in Division") in consolidated C.T.A. Case Nos. 6791 and 6836, which ordered him to pay CE Cebu Geothermal Power Company, Inc. the reduced amount of ₱12,295,087.16, representing the latter's excess and unutilized input VAT for the period covering September 1, 2001 to December 31, 2002.

On the other hand, the second petition, docketed as C.T.A. EB No. 427, was filed by CE Cebu Geothermal Power Company, Inc.[3] which is praying that its entire claim for refund or issuance of tax credit certificate of its excess and unutilized input VAT in the amount of ₱19,101,021.78 be granted by the Court *En Banc*.

Since both Petitions for Review involve the same parties and subject matter, We deemed it necessary to consolidate the aforementioned petitions.[4]

Antecedent Facts

The facts, as narrated by the Court in Division, are as follows:

> "CE Cebu Geothermal Power Company, Inc. (petitioner) is a domestic corporation organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal business address at the 24th Floor, 6750 Bldg., Ayala Avenue, Makati City. Petitioner is registered as a VAT taxpayer with the Bureau of Internal Revenue (BIR) with Certificate of Registration No. 96-047-005171 and Taxpayer Identification No. 047-0003-459-879-V.
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> On the other hand, respondent is the duly appointed Commissioner of Internal Revenue, vested with authority to administer and enforce national internal revenue laws, including, *inter alia*, the power to grant claims for refund

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[1] *Rollo*, C.T.A. EB No. 426, pp. 7 – 57, with Annexes.
[2] Penned by *Associate Justice Juanito C. Castañeda, Jr.*, with *Associate Justices Erlinda P.Uy and Olga Palanca-Enriquez* concurring.
[3] *Rollo*, C.T.A. EB No. 427, pp. 7 – 84, with Annexes.
[4] *Rollo*, C.T.A. EB No. 426, pp.102 – 103, Resolution dated January 27, 2009.

of any internal revenue taxes erroneously or excessively paid, assessed or collected. He holds office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

Petitioner is engaged in the business of power generation and the subsequent sale of generated power to its sole customer, Philippine National Oil Company-Energy Development Corporation (PNOC-EDC), by virtue of a Build-Operate Transfer Agreement. On April 16, 1994, petitioner was accredited and certified by the Department of Energy to own and operate a 125-Megawatt power plant facility in Barangay Lin-ao, Kananga, Province of Leyte.

On January 29, 1996, petitioner was registered as a VAT taxpayer with the BIR Revenue District Office No. 47, East Makati, in accordance with Section 236 of the National Internal Revenue Code. However, on June 26, 2001, Republic Act (R.A.) No. 9136 took effect, and the relevant provisions of the National Internal Revenue Code of 1997 (1997 Tax Code) were deemed modified.

R.A. No. 9136, also known as the 'Electric Power Industry Reform Act of 2001', was enacted by Congress to ordain reforms in the electric power industry, highlighting, among others, the importance of ensuring the reliability, security and affordability of the supply of electric power to end-users. Under the provisions of this Republic Act and its implementing rules and regulations, the delivery and supply of electric energy by generation companies became VAT zero-rated, which previously were subject to ten percent (10%) VAT. In relation thereto, Section 6 of Chapter II and Section 6 of Rule 5 of its Implementing Rules and Regulations state that:

'Republic Act No. 9136

Electric Power Industry Reform Act of 2001 (EPIRA)

CHAPTER II

Organization and Operation of the Electric Power Industry

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SECTION. 6. *Generation Sector* — Generation of electric power, a business affected with public interest shall be competitive and open.

Upon the effectivity of this Act, any new generation company shall, before it operates, secure from the Energy Regulatory Commission (ERC) a certificate of compliance pursuant to the standards set forth in this Act, as well as health, safety and environmental clearances from the appropriate government agencies under existing laws.

Any law to the contrary notwithstanding, power generation shall not be considered a public utility operation. For this purpose, any person or entity engaged or which shall engage in power generation and supply of electricity shall not be required to secure a national franchise.

Upon the implementation of retail competition and open access, the prices charged by a generation company for the supply of electricity shall not be subject to regulation by the ERC except as otherwise provided in this Act.

Pursuant to the objective of lowering electricity rates to end-users, sales of generated power by generation companies shall be value added tax zero-rated.

The ERC shall, in determining the existence of market power abuse or anti-competitive behavior, require from generation companies the submission of their financial statements.' (*Emphasis supplied*)

'Rules and Regulations to Implement Republic Act No. 9136, entitled "Electric Power Industry Reform Act of 2001"

RULE 5

Generation Sector

xxx xxx xxx

SECTION 6. *Generation Charges and VAT.* –

xxx xxx xxx

(b) Pursuant to the policy of reducing electricity rates to End-users, sales of generated power by a Generation Company shall, from the effectivity of the Act, be zero-rated for the purpose of imposition of value-added tax. Towards this end, the imposition of zero percent (0%) VAT shall apply to the sale of generated power by a Generation Company through all stages of sale until it reaches the End-user. The DOE, through the BIR, shall issue the necessary revenue regulation within sixty (60) calendar days from effectivity of these rules.'

The amendment of the 1997 Tax Code modified the VAT rate applicable to sales of generated power by generation companies from ten (10%) percent to zero (0%) percent. Thus, when the EPIRA took effect on June 26, 2001, petitioner adopted the VAT zero-rating of the EPIRA in computing for its VAT payable when it filed its VAT Returns, on the belief that its sales qualify for VAT zero-rating.

The details of its Returns are as follows:

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On November 12, 2001, petitioner filed an Amended Quarterly VAT Return for the Third Quarter of 2001. On September 24, 2003, petitioner again filed an Amended Quarterly VAT Returns for the Second and Third Quarters of 2002. Finally, on April 24, 2003, petitioner amended its Quarterly VAT Return for the Fourth Quarter of 2002. The Amended Returns reflect the following details:

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On September 26, 2003, petitioner filed an administrative claim for refund or issuance of tax credit certificate in the amount of P827,896.24, representing alleged excess input VAT for the Third Quarter of 2001. Thereafter, it filed the corresponding Petition for Review on September 30, 2003 in order to comply with the prescriptive period required in Section 112(A) of the National Internal Revenue Code of 1997.

Its administrative claim for refund or issuance of tax credit certificate for the Fourth Quarter of 2001 and all quarters of 2002, in the amount of P18,273,125.54 was filed on December 18, 2003. The corresponding Petition for Review was filed on December 19, 2003.

Respondent interposed the following Special and Affirmative Defenses in his Answer:

'3. He reiterates and repleads the preceding paragraphs of this answer as part of his Special and Affirmative Defenses;

4. Petitioner's claim for refund is subject to the administrative investigation/examination by the respondent;

5. To support its claim, it is imperative for petitioner to prove the following, viz:

   a. The registration requirements of a value-added taxpayer in compliance with Section 6(a) and (b) of the Revenue Regulations No. 6-97 in relation to Section 4.107.1 (a) of Revenue Regulations No. 7-95, and Section 236 of the Tax Code, as amended;

   b. The invoicing and accounting requirements for VAT-registered persons as well as the filing and payment of VAT in compliance with the provisions of Sections 113 and 114 of the Tax Code as amended:

   c. Proof of compliance with the prescribed checklist of requirements to be submitted involving claim for VAT refund in pursuance to Revenue Memorandum Order No. 53-98, **otherwise there would be no sufficient compliance with the filing of administrative claim for refund which is a condition sine qua non prior to the filing of judicial claim** in accordance with the provision of Section 229 of the Tax Code, as amended. It is worthy of emphasis that Section 112 (D) of the Tax Code, as amended, requires the **submission of complete documents in support of the application filed** with the Bureau of Internal Revenue before the 120-day audit period shall apply, and **before the taxpayer could avail of judicial remedies as provided for in the law**. Hence, petitioner's failure to submit proof of compliance with the above-stated requirements warrants immediate dismissal of the petition for review;

   d. That the input taxes of P827,896.24 allegedly paid by the petitioner on its purchase of goods and services for the third

quarter of taxable year 2001 were attributable to its zero-rated sales and such have not been applied against any output tax and were not carried over in the succeeding taxable quarter or quarters;

e. That petitioner's administrative and judicial claims for tax credit or refund of the unutilized input tax (VAT) was filed within two (2) years after the close of the taxable quarter when the sales were made in accordance with Section 112 (A) and (D) and 229 of the Tax Code, as amended;

f. That petitioner's domestic purchases of goods and services were made in the course of trade or business, properly supported by VAT invoices and/or official receipts and other documents, such as subsidiary purchase Journal, showing that it actually paid VAT in accordance with Sections 110 (A) (2) and 113 of the Tax Code as amended, and in pursuance to Section 4.104-5 (a) & (b) of Revenue Regulations No. 7-95 (Re: Substantiation of Claims for Input tax Credit);

g. The requirements as enumerated under Section 4.104-2 of the Revenue Regulations 7-95. (Re: Persons who can avail of the Input Tax Credits);

6. Furthermore, in an action for refund the burden of proof is on the taxpayer to establish its right to refund and failure to sustain the burden is fatal to the claim for refund/credit. This is so because exemptions from taxation are highly disfavored in law and he who claims exemption must be able to justify his claim by the clearest grant of organic or statutory law. An exemption from common burden cannot be permitted to exist upon vague implications (Asiatic Petroleum Co. {P.I} v. Llanes, 49 Phil. 466 cited in Collector of Internal Revenue vs. Manila Jockey Club, Inc. 98 Phil. 670);

7. Claims for refunds are construed strictly against the claimant for the same partake the nature of exemption from taxation.'

Petitioner pleaded the same Special and Affirmative Defenses in CTA Case No. 6836, except for the claimed amount of tax refund in No. 6(d) which is P18,273,125.54 instead, allegedly paid by petitioner on its purchases of goods and services and importation of goods for the Fourth Quarter of 2001 and the four quarters of 2002.

Petitioner presented various testimonial and documentary evidence mainly to prove compliance with the accounting and invoicing requirements for the granting of its claim. Petitioner likewise moved for the commissioning of an Independent Certified Public Accountant (ICPA) to help determine the veracity of its application for refund, which the Court granted on February 16, 2005.

Respondent presented documentary evidence to show that he investigated the claim for refund and that due process was accorded petitioner in denying its claim.

On November 20, 2007, the case was submitted for decision after both parties filed their respective Memorandum".[5] *(Citations omitted)*

The Ruling of the Court in Division

In a Decision promulgated on May 15, 2008, the Court in Division partially granted CE Cebu Geothermal Power Company, Inc.'s subject claim for a refund or issuance of a tax credit certificate of its excess and unutilized input VAT for the period covering September 1, 2001 to December 31, 2002 in the amount of ₱12,295,087.16.

According to the Court in Division, CE Cebu Geothermal Power Company, Inc. qualified for VAT zero-rating under R.A. 9136 since it was able to prove that it is a power generation company which generated sales from PNOC-EDC for the subject period.

The Court in Division however, found that CE Cebu Geothermal Power Company, Inc. was not entitled to the full amount applied for due to the following reasons:

1. There were certain reportorial discrepancies in its zero-rated sales;
2. Some official receipts were not imprinted with the word "zero-rated", in violation of Section 113 (A) of the 1997 National Internal Revenue Code ("NIRC") and Section 4.108-1 of Revenue Regulations ("RR") 7-95;
3. Not all the input VAT were duly substantiated and/or were with supporting documents; and
4. Some of the input VAT were outside the period of claim.

[5] *Rollo,* C.T.A. EB No. 426, pp. 18 – 26, assailed Decision, pp. 2 – 10.

The Court in Division likewise ruled that the subject unutilized input VAT were not applied against any output VAT liability in the succeeding taxable quarters after the 3rd Quarter of taxable year 2001.

The Court in Division further held that CE Cebu Geothermal Power Company, Inc.'s administrative and judicial claims were seasonably filed.

In sum, the Court in Division found CE Cebu Geothermal Power Company, Inc. entitled to the refund of its unutilized input VAT, but in the reduced amount of ₱12,295,087.16, computed as follows:

Amount of Claimed Input VAT		P19,101,021.78
Less: Disallowances		
Per the ICPA's Summary Report	P 4,917,591.14	
Per the Court's further verification	633,206.17	5,550,797.31
Substantiated Input VAT		P13,550,224.47
Multiply by Ratio of Substantiated Zero-Rated	P2,821,754,992.64	
Sales to the Total Reported Zero-Rated Sales	÷P3,109,812,321.66	90.7371475%
Refundable Input VAT		**P12,295,087.16**

The *fallo* of the Decision reads as follows:

> "**WHEREFORE**, the consolidated Petitions for Review are hereby **PARTIALLY GRANTED**. Accordingly, respondent is hereby **ORDERED TO REFUND** or **TO ISSUE A TAX CREDIT CERTIFICATE** in favor of petitioner in the reduced amount of **TWELVE MILLION TWO HUNDRED NINETY-FIVE THOUSAND EIGHTY SEVEN PESOS and 16/100 (P12,295,087.16)**, representing petitioner's excess and unutilized input VAT for the period covering September 1, 2001 to December 31, 2002.
>
> **SO ORDERED.**"

Dissatisfied, CE Cebu Geothermal Power Company, Inc. filed a Motion for Partial Reconsideration of the aforementioned Decision on June 5, 2008. Also aggrieved, the Commissioner of Internal Revenue filed his Motion for Partial Reconsideration on June 6, 2008.

In a Resolution dated October 6, 2008, the Court in Division denied both Motions for Partial Reconsideration for lack of merit.

Hence, the Commissioner of Internal Revenue and CE Cebu Geothermal Power Company, Inc. filed their respective Petitions for Review with the Court *En Banc* on November 10, 2008 and November 7, 2008, respectively. The appeal by the Commissioner of Internal Revenue was docketed as C.T.A. EB No. 426 while the appeal by CE Cebu Geothermal Power Company, Inc. was docketed as C.T.A. EB No. 427.

In a Resolution dated January 27, 2009, We ordered the consolidation of C.T.A. EB No. 426 with C.T.A. EB No. 427.[6] Considering that both parties are petitioners and respondents at the same time, they shall be referred to by their respective names throughout the rest of this Decision. Thus, the term "Commissioner" shall refer to the Commissioner of Internal Revenue and the name "CE Cebu" shall refer to CE Cebu Geothermal Power Company, Inc.

The Issues

The following are the issues raised by the parties in their respective Petitions for Review:

C.T.A. EB No. 426
Commissioner of Internal Revenue vs.
CE Cebu Geothermal Power Company, Inc.

"The Honorable Second Division of the Court of Tax Appeals erred in resolving that respondent is entitled to a partial refund of its unutilized excess input value-added tax attributable to its zero-rated sales for the period September 1, 2001 to December 31, 2002."

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[6] *Supra* note 4.

C.T.A. EB No. 427
CE Cebu Geothermal Power Company, Inc.
vs. Commissioner of Internal Revenue

"The CTA-Division erred when it disallowed the following input VAT claims of the petitioner:

Input VAT Claim	Amount
Based on Independent CPA Findings	₱4,917,591.14
Based on Court Verification	633,206.17
Based on proportionate amount of unsubstantiated zero-rated sales	1,255,137.31
Total	₱6,805,934.62"

THE COMMISSIONER'S ARGUMENTS IN C.T.A. EB No. 426

The Commissioner avers that CE Cebu is not entitled to a refund or tax credit even in the reduced amount because the latter failed to submit all the necessary and relevant documents pertaining to its claim when it filed its administrative claims. Hence, its administrative claims were merely *pro forma.*

The Commissioner also asserts that he was not given sufficient time by CE Cebu to investigate and evaluate the administrative claims as there were only four (4) days between the filing of the claim for the 3rd Quarter of 2001 and the Petition for Review in C.T.A Case No.6791 and one (1) day between the filing of the claim for the 4th Quarter of 2001 up to the 4th Quarter of 2002 and the Petition for Review in C.T.A. Case No. 6836.

CE CEBU'S ARGUMENTS IN C.T.A. EB No. 427

CE Cebu maintains that it has proven by preponderance of evidence that it is entitled to the refund of its excess and/or unutilized input VAT attributable to its zero-rated sales of generated power in the total amount of ₱19,101,021.78.

CE Cebu also posits that the official receipts and invoices bearing the pre-printed word "TIN-V" instead of "TIN-VAT" covering some of its input VAT claim are not fatal to its claim for refund.

CE Cebu further contends that its official receipts bearing the stamp "zero-rated" complied with the requirements of the law for the purpose of VAT zero-rating.

Lastly, CE Cebu argues that assuming that a ratable portion of its input VAT is disallowed, the Court in Division erred in computing the disallowed input VAT amounting to ₱1,255,137.31.

The Ruling of the Court En Banc

Our ruling on these cases hinges on how We will resolve the following key issues: (1) the Court's jurisdiction over CE Cebu's claim for input VAT refund or tax credit; (2) CE Cebu's compliance with invoicing requirements; and (3) the computation of the disallowed input VAT amounting to ₱1,255,137.31.

Jurisdiction

CE Cebu's claim for input VAT refund or tax credit is anchored on Section 112(A) of the 1997 NIRC, *viz*:

> "SEC. 112. Refunds or Tax Credits of Input Tax. –
>
> (A) Zero-rated or Effectively Zero-rated Sales. – Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: Provided, however, That in the case of zero-rated sales under Section 106(A)(2)(a)(1),(2) and (B) and Section 108 (B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): Provided, further, That

> where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales."

The Court in Division correctly explained in its assailed Resolution that while the submission of complete supporting documents is necessary for the granting of a refund or tax credit certificate, the afore-quoted provision does not state that the non-submission of the supposed complete documents makes the administrative claim for refund or tax credit certificate invalid or *pro forma,* the effect of which makes the judicial appeal dismissible for lack of jurisdiction.[7]

The Court in Division also aptly pointed out that CE Cebu's administrative claim for refund or tax credit certificate of unutilized input VAT for the 3rd and 4th Quarters of 2001 was denied not because of its "failure to substantiate" its claim but because according to the BIR[8], CE Cebu "presumptively opted to carry-over the alleged input tax, to the succeeding quarters."[9] Thus, the Commissioner's contention has no leg to stand on.

Moreover, We find no merit in the Commissioner's argument that he was not given sufficient time by CE Cebu to investigate and evaluate the administrative claims as there were only four (4) days and one (1) day, respectively, between the filing of the administrative claims and the Petitions for Review in C.T.A. Case Nos. 6791 and 6836. In other words, he avers that CE Cebu's judicial claims violated the doctrine of exhaustion of administrative remedies. In effect, said judicial claims were

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[7] *Rollo,* C.T.A. EB No. 426, p. 50.
[8] Thru then Deputy Commissioner for Special Concerns and OIC-Large Taxpayers Service Kim S. Jacinto-Henares.
[9] *BIR Records*, pp. 282 and 275.

prematurely filed since the 120 days given to the Commissioner to decide on the claims under Section 112 (D) of the 1997 NIRC had yet to lapse when the Petitions for Review docketed as C.T.A. Case Nos. 6791 and 6836 were filed with the Court in Division.

Section 112(D)[10] of the 1997 NIRC provides:

"SEC. 112. **Refunds or Tax Credits of Input Tax.** –

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(D) Period within which Refund or Tax Credit of Input Taxes shall be Made. – In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsections (A) and (B) hereof.

In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, **the taxpayer affected may,** within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, **appeal the decision or the unacted claim with the Court of Tax Appeals.**" (*Emphasis supplied*)

The use of the word "may" in the afore-quoted provision indicates that judicial recourse within thirty days after the lapse of the 120-day period is directory and permissive and not mandatory nor jurisdictional as long as the said period is within the 2-year prescriptive period under Section 229[11] of the NIRC.[12] It is a well-settled doctrine in statutory construction that the word "may" when used in a

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[10] now Section 112 (C) of the 1997 NIRC, as amended by R.A. 9337.

[11] Sec. 229. Recovery of Tax Erroneously or Illegally Collected. — No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: Provided, however, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.

[12] Commissioner of Internal Revenue v. San Roque Power Corporation, C.T.A. EB No. 408 (C.T.A. Case No. 6647), March 25, 2009.

statute, is permissive and operates to confer discretion; it cannot be construed as having a mandatory effect.[13]

Consequently, We have consistently ruled that taxpayers need not wait for the lapse of the subject 120-day period before lodging their judicial claim.[14] In *Commissioner of Internal Revenue v. Toledo Power, Inc.,*[15] We explained that:

> "**It is true that Section 112 (D) of the abovementioned provision applies to the present case. However, what the petitioner failed to consider is Section 112 (A) of the same provision.** The respondent is also covered by the two (2) year prescriptive period. We have repeatedly held that the claim for refund with the BIR and the subsequent appeal to the Court of Tax Appeals must be filed within the two-year period.
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> Accordingly, the Supreme Court held in the case of *Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue* that the two-year prescriptive period for filing a claim for input tax is reckoned from the date of the filing of the quarterly VAT return and payment of the tax due. **If the said period is about to expire but the BIR has not yet acted on the application for refund, the taxpayer may interpose a petition for review with this Court within the two year period.**
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> In the case of *Gibbs vs. Collector,* the Supreme Court held that if, however, the Collector (now Commissioner) takes time in deciding the claim, and the period of two years is about to end, the suit or proceeding must be started in the Court of Tax Appeals before the end of the two-year period without awaiting the decision of the Collector.
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> Furthermore, in the case of *Commissioner of Customs and Commissioner of Internal Revenue vs. The Honorable Court of Tax Appeals and Planters Products, Inc.,* **the Supreme Court held that the taxpayer need not wait indefinitely for a decision or ruling which may or may not be forthcoming and which he has no legal right to expect.** It is disheartening enough to a taxpayer to keep him waiting for an indefinite period of time for a ruling or decision of the Collector (now Commissioner) of Internal Revenue on his claim for refund. It would make matters more exasperating for the taxpayer if we were to close the doors of the courts of justice for such a relief until after the Collector (now Commissioner) of Internal Revenue, would have, at his personal convenience, given his go signal.
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> This Court ruled in several cases that once the petition is filed, the Court has already acquired jurisdiction over the claims and the Court is not bound to wait indefinitely for no reason for whatever action respondent (herein petitioner) may take. **At stake are claims for refund and unlike disputed**

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[13] Republic Planters Bank v. Hon. Enrique A. Agana, Sr. et.al., G.R. No. 51765, March 3, 1997, 269 SCRA 1.
[14] *Supra* note 12.
[15] C.T.A. EB Case No. 321 (C.T.A. Case Nos. 6805 & 6851), May 7, 2008.

assessments, no decision of respondent (herein petitioner) is required before one can go to this Court." *(Emphasis supplied and citations omitted)*

Moreover, We quote with approval the Court in Division's disquisition on the doctrine of exhaustion of administrative remedies:

> "It is without doubt that, as a rule, the *doctrine of exhaustion of administrative remedies* must not be disregarded. However, there are a number of instances when the doctrine may be dispensed with and judicial action may be validly resorted to immediately. Two of these exceptional cases are (1) when there is urgent need for judicial intervention, and (2) when irreparable damage will be suffered.
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> It cannot be overemphasized that Sections 229 and 112 are clear on the period within which to file a claim for refund or tax credit certificate. Such period expires "regardless of any supervening clause that may arise after payment" of the tax. In *College of Oral & Dental Surgery vs. Court of Tax Appeals, et al.*, the Supreme Court ruled:
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>> 'This Court, construing the aforequoted provision of law in an identical case, made the pronouncement that although the filing of the claim with the Collector of Internal Revenue is intended as a notice to said official that unless the tax or penalty alleged to have been erroneously or illegally collected is refunded court action will follow, this does not imply that the taxpayer must await for the action of the Collector before bringing the matter to court (P.J. Kiener Co., Ltd. vs. David, 92 Phil., 945, penned by Mr. Justice Pedro Tuason). Indeed, it must be observed that under said provisions, ***the taxpayer's failure to comply with the requirement regarding the institution of the action or proceeding in court within 2 years after the payment of the taxes bars him from the recovery of the same***, irrespective of whether a claim for the refund of such taxes filed with the Collector of Internal Revenue is still pending action of the latter.' (*Emphasis supplied*)
>
> Upon the expiration of the said period, petitioner loses its right to seek judicial redress on the claim. Thus, before such expiration, judicial intervention must be sought."[16] *(Citations omitted)*

Furthermore, it is apparent from the following provisions of Revenue Memorandum Circular No. 49-03 dated August 18, 2003,[17] that indeed taxpayers need not wait for the lapse of the subject 120-day period since claims for VAT

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[16] *Rollo*, C.T.A. EB No. 426, pp. 51 – 52.

[17] Entitled *"Amending Answer to Question Number 17 of Revenue Memorandum Circular No. 42-2003 and Providing Additional Guidelines on Issues Relative to the Processing of Claims for Value-Added Tax (VAT) Credit/Refund, Including Those Filed with the Tax and Revenue Group, One-Stop Shop Inter-Agency Tax Credit and Duty Drawback Center, Department of Finance (OSS-DOF) by Direct Exporters"*

refund or tax credit filed with the Court can proceed simultaneously with the ones filed with the BIR, to wit:

> "In response to request of selected taxpayers for adoption of procedures in handling refund cases that are aligned to the statutory requirements that refund cases should be elevated to the Court of Tax Appeals before the lapse of the period prescribed by law, certain provisions of RMC No. 42-2003 are hereby amended and new provisions are added thereto.
>
> In consonance therewith, the following amendments are being introduced to RMC No. 42-2003, to wit:
>
> I.) A-17 of Revenue Memorandum Circular No. 42-2003 is hereby revised to read as follows:
>
> **In cases where the taxpayer has filed a "Petition for Review" with the Court of Tax Appeals involving a claim for refund/TCC that is pending at the administrative agency (Bureau of Internal Revenue or OSS-DOF), the administrative agency and the tax court may act on the case separately.** While the case is pending in the tax court and at the same time is still under process by the administrative agency, the litigation lawyer of the BIR, upon receipt of the summons from the tax court, shall request from the head of the investigating/processing office for the docket containing certified true copies of all the documents pertinent to the claim. The docket shall be presented to the court as evidence for the BIR in its defense on the tax credit/refund case filed by the taxpayer. **In the meantime, the investigating/processing office of the administrative agency shall continue processing the refund/TCC case until such time that a final decision has been reached by either the CTA or the administrative agency.**
>
> **If the CTA is able to release its decision ahead of the evaluation of the administrative agency, the latter shall cease from processing the claim.** On the other hand, if the administrative agency is able to process the claim of the taxpayer ahead of the CTA and the taxpayer is amenable to the findings thereof, the concerned taxpayer must file a motion to withdraw the claim with the CTA. xxx." *(Emphasis supplied)*

Verily, the Commissioner knows that he may still evaluate and act on the taxpayer's claim for refund or tax credit even if a Petition for Review has already been filed with this Court.

Invoicing Requirements

Having established that this Court has jurisdiction over this case, We proceed to the issue raised by CE Cebu with regard to certain invoicing requirements.

The Court in Division disallowed CE Cebu's official receipts and invoices covering some of its input VAT where such official receipts and invoices bore the pre-printed word "TIN-V" instead of "TIN-VAT" in the total amount of ₱743,595.56, on the basis of Section 4.108-1 of RR 7-95.

The Court in Division also disallowed a portion of CE Cebu's input VAT in the amount of ₱1,255,137.31 representing the amount of unsubstantiated input VAT based on the ratio between CE Cebu's unsubstantiated zero-rated sales and total zero-rated sales of generated power. These unsubstantiated zero-rated sales pertain to the official receipts CE Cebu issued to PNOC-EDC evidencing its zero-rated sales of generated power which did not bear the pre-printed word "zero-rated".

CE Cebu submits that based on the provisions of the 1997 NIRC and the case of *Intel Technology Philippines, Inc. v. Commissioner of Internal Revenue*,[18] the indication of the term "TIN-V" is sufficient for VAT purposes. It also posits that the imprinting of the word "zero-rated" in invoices or official receipts is not a mandatory requirement and that the failure to comply therewith should not result in the outright denial of the claim. It then argues that RR 7-95 is an invalid administrative regulation.

We are not persuaded.

Section 112(A) of the 1997 NIRC which We have previously quoted, allows the tax refund or credit of the input tax of zero-rated sales. To establish zero-rated sales of services as well as input taxes in claims for refund, the corresponding duly

[18] G.R. No. 166732, April 27, 2007, 522 SCRA 657.

registered official receipts and invoices must be presented pursuant to Sections 113 and 237 of the NIRC of 1997, to wit:

> "**SEC. 113. Invoicing and Accounting Requirements for VAT-Registered Persons. —**
>
> (A) Invoicing Requirements. — **A VAT-registered person, shall, for every sale, issue an invoice or receipt.** In addition to the information required under Section 237, the following information shall be **indicated in the invoice or receipt**:
>
> (1) **A statement that the seller is a VAT-registered person, followed by his taxpayer's identification number (TIN)**; and
>
> (2) The total amount which the purchaser pays or is obligated to pay to the seller with the indication that such amount includes the value-added tax.
>
> xxx xxx xxx"
>
> "**SEC. 237. Issuance of Receipts or Sales or Commercial Invoices. —**
>
> **All persons subject to an internal revenue tax shall**, for each sale or transfer of merchandise or for services rendered valued at Twenty-five pesos (P25.00) or more, **issue duly registered receipts or sales or commercial invoices** xxx." *(Emphasis supplied)*

The foregoing provisions should not be taken in isolation but in conjunction with Section 4.108-1 of RR 7-95 (The Consolidated Value-Added Tax Regulations) which enumerates the information that must appear on the face of the receipts or invoices issued for sales of goods or services by all VAT registered persons, *viz*:

> "**SEC. 4.108-1. Invoicing Requirements — All VAT-registered persons shall,** for every sale or lease of goods or properties or services, **issue duly registered receipts or sales or commercial invoices** which must show:
>
> 1. the name, TIN and address of seller;
> 2. date of transaction;
> 3. quantity, unit cost and description of merchandise or nature of service;
> 4. the name, TIN, business style, if any, and address of the VAT-registered purchaser, customer or client;
> 5. **the word 'zero-rated' imprinted on the invoice covering zero-rated sales**; and
> 6. the invoice value or consideration.

In the case of sale of real property subject to VAT and where the zonal or market value is higher than the actual consideration, the VAT shall be separately indicated in the invoice or receipt.

Only VAT-registered persons are required to print their TIN followed by the word 'VAT' in their invoices or receipts and this shall be considered as 'VAT Invoice'. All purchases covered by invoices other than 'VAT Invoice' shall not give rise to any input tax.

If the taxable person is also engaged in exempt operations, he should issue separate invoices or receipts for the taxable and exempt operations. A 'VAT Invoice' shall be issued only for sales of goods, properties or services subject to VAT imposed in Sections 100 and 102 of the code.

The invoice or receipt shall be prepared at least in duplicate, the original to be given to the buyer and the duplicate to be retained by the seller as part of his accounting records."*(Emphasis supplied)*

In the case of ***Atlas Consolidated Mining and Development Corporation v. Commissioner of Internal Revenue,***[19] the Supreme Court clearly recognized that applications for refund/credit of input VAT filed with the BIR must comply with the appropriate Revenue Regulations. The Supreme Court, in citing the case of *Commissioner of Internal Revenue v. Manila Mining Corporation,*[20] stressed the importance of complying with the substantiation requirements for claiming refund/credit of input VAT on zero-rated sales in accordance with the appropriate Revenue Regulations, in this wise:

"Although the foregoing decision focused only on the proof required for the applicant for refund/credit to establish the input VAT payments it had made on its *purchases* from suppliers, **Revenue Regulations No. 3-88 also required it to present evidence proving actual zero-rated VAT *sales* to qualified buyers,** such as (1) photocopy of the approved application for zero-rate if filing for the first time; (2) sales invoice or receipt showing the name of the person or entity to whom the goods or services were delivered, date of delivery, amount of consideration, and description of goods or services delivered; and (3) the evidence of actual receipt of goods or services." *(Emphasis supplied)*

[19] G.R. Nos. 141104 & 148763, June 8, 2007, 524 SCRA 112.
[20] G.R. No. 153204, August 31, 2005, 468 SCRA 571.

Thus, by analogy, in order for CE Cebu to be entitled to its claim for refund/issuance of tax credit certificate representing unutilized input VAT attributable to its zero-rated sales for the period September 1, 2001 to December 30, 2002, it must comply with the substantiation requirements under the appropriate Revenue Regulations i.e. RR 7-95.[21]

In connection with the afore-quoted NIRC provisions and Revenue Regulations, it is noteworthy to quote a portion of the case of ***American Express International, Inc., Philippine Branch v. Commissioner of Internal Revenue***[22] which reads:

> "The law is very clear. Section 113 provides that "a VAT registered person shall, for every sale, issue a duly registered VAT invoice or receipt for every sale transaction". **Such VAT invoice or receipt must show the taxpayer identification number, followed by the word "VAT",** the BIR Authority imprint or BIR permit marker **and the word "zero-rated" imprinted on the invoice or receipt covering a zero-rated sale.** Considering so, the sales of services referred to under Section 108 (B) (2) of the NIRC of 1997, as amended, as being subject to zero percent (0%) rate are those sales covered by duly registered VAT official receipts.
>
> **The VAT registered person must substantiate the input VAT paid by purchase invoices or official receipts.** An official receipt issued by the taxpayer is an essential requirement to prove the existence of sale and receipt of income and thereafter duly recorded in the accounting records.
>
> The afore-quoted revenue regulation issued to implement the NIRC provision on VAT invoicing and accounting requirements is mandatory as the word "shall" is used. The word "shall" is imperative, commonly operating to impose an obligation or duty which may be enforced; it is a word of command that must be given a compulsory meaning (Pioneer Texturing Corp. vs. NLRC, 280 SCRA 806). Indeed, it is the duty of a seller-taxpayer to comply with the invoicing requirements laid down in the said NIRC provisions and Revenue Regulations."

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[21] Panasonic Communications Imaging Corporation of the Philippines (formerly Matsushita Business Machine Corporation of the Philippines) v. Commissioner of Internal Revenue, C.T.A. EB No. 233 (C.T.A. Case No. 6245), November 20, 2007.

[22] C.T.A. EB No. 103 (C.T.A. Case No. 6294), March 3, 2006.

Furthermore, pursuant to Revenue Memorandum Circular No. 42-2003,[23] failure to comply with the invoicing requirements on the documents supporting the sale of goods and services will result in the disallowance of the claim for input tax of the taxpayer claimant. Thus, if the claim for refund/issuance of tax credit certificate is based on the existence of zero-rated sales by the taxpayer, but the latter fails to comply with the invoicing requirements in the issuance of sales invoices and receipts, the claim for tax credit/refund of VAT on its sales shall be denied.

The relevant portion of the said Circular provides:

> "A-13. **Failure by the supplier to comply with the invoicing requirements on the documents supporting the sale of goods and services will result to the disallowance of the claim for input tax by the purchaser-claimant.**
>
> If the claim for refund/TCC is based on the existence of zero-rated sales by the taxpayer but it fails to comply with the invoicing requirements in the issuance of sales invoices (e.g., failure to indicate the TIN), its claim for tax credit/refund of VAT on its purchases shall be denied considering that the invoice it is issuing to its customers does not depict its being a VAT-registered taxpayer whose sales are classified as zero-rated sales. Nonetheless, this treatment is without prejudice to the right of the taxpayer to charge the input taxes to the appropriate expense account or asset account subject to depreciation, whichever is applicable. Moreover, the case shall be referred by the processing office to the concerned BIR office for verification of other tax liabilities of the taxpayer."

Equally important is the learned disquisition of the Court in Division in its Resolution, to wit:

> "It is a cardinal rule of statutory construction that courts must give effect to the general legislative intent that can be discovered from or is unraveled by the four corners of the statute, and in order to discover said intent, the whole statute, and not only a particular provision thereof, should be considered.
>
> Petitioner[24] failed to consider Section 110 of the Tax Code of 1997, which provides as follows:

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[23] Entitled *"Clarifying Certain Issues Raised Relative to the Processing of Claims for Value-Added Tax (VAT) Credit/Refund, Including Those Filed with the Tax and Revenue Group, One-Stop Shop Inter-Agency Tax Credit and Duty Drawback Center, Department of Finance (OSS) by Direct Exporters."*

[24] CE Cebu.

"SEC. 110. Tax Credits. –

(A) Creditable Input Tax. –

(1) Any input tax **evidenced by a VAT invoice or official receipt** issued in accordance with Section 113 hereof on the following transactions shall be creditable against the output tax:

(a) Purchase or importation of goods:

xxx xxx xxx

(b) Purchase of services on which a value-added tax has been actually paid.

xxx xxx xxx" *(Emphasis supplied)*

By virtue of the foregoing provision, it is clear that the input VAT shall be creditable to the output VAT when such input VAT is 'evidenced by a VAT invoice or official receipt'.

The Secretary of Finance, upon recommendation of the Commissioner of Internal Revenue, provided the definition of the term 'VAT Invoice' under Section 4.108-1 of Revenue Regulations No. (R.R.) 7-95, thus:

> 'Only VAT-registered persons are required to print their TIN followed by the word "VAT" in their invoices or receipts **and this shall be considered as a 'VAT Invoice'**. All purchases covered by invoices other than 'VAT Invoice' shall not give rise to any input tax.' *(Emphasis supplied)*

The said Revenue Regulations was promulgated *for the effective enforcement of the provisions of* the Tax Code of 1997.

The rule is that as long as administrative issuances relate solely to carrying into effect the provisions of the law, they are valid and have the force of law. Here, there is no indication that, in defining the term 'VAT Invoice' under the said Regulations, the Secretary of Finance went beyond the terms and provisions of the Tax Code. In fact, it is quite the opposite, since it aids taxpayers in identifying which are considered as a "VAT Invoice" for the purpose of claiming input VAT.

Furthermore, it is noteworthy that the above-quoted Section 110 was recently re-enacted under Section 8 of Republic Act (R.A.) No. 9337.

By virtue of such re-enactment, the principle of legislative approval of administrative interpretation by re-enactment clearly obtains in this case. The principle provides that 'the re-enactment of a statute substantially unchanged is persuasive indication of the adoption by Congress of a prior executive construction'. Stated differently, when a statute is susceptible of the meaning placed upon it by a ruling of the government agency charged with its enforcement and the Legislature thereafter re-enacts the provisions without substantial change, such action is to some extent confirmatory that the ruling carries out the legislative purpose.

> In the interpretation of re-enacted statutes the Court will follow the construction which they received when previously in force. The Legislature will be presumed to know the effect which such statute originally had, and by re-enactment to intend that they should again have the same effect. It is not necessary that a statute should be re-enacted in identical words in order that the rule may apply. It is sufficient if it is re-enacted in substantially the same words. The rule has been held to apply to the re-enactment of a statute which received a practical construction on the part of those who are called upon to execute it.
>
> **Petitioner heavily relies on the *Intel* case to support its arguments. The said case, however, is *not* applicable in resolving the instant issue, precisely because the issues raised and the factual circumstances in the *Intel* case are different.** In the *Intel* case, the purchasers of goods of petitioner therein are foreign entities which are, logically, not VAT-registered in our country nor liable to pay VAT in our jurisdiction; while in this case, the sole customer of petitioner is a local entity, the Philippine National Oil Company-Energy Development Corporation, which, in all probability, is a VAT-registered person or at least liable to pay VAT in this jurisdiction.
>
> **In the *Intel* case, the evil sought to be avoided in requiring the imprinting of the words 'zero-rated' and/or 'TIN-VAT' on the invoice or official receipt covering zero-rated transactions is *not* present.** Such being the case, petitioner cannot simply dismiss the invoicing requirements as 'mere technicality' imposed by the Secretary of Finance."[25] *(Emphasis supplied, Citations omitted)*

Based on the foregoing discussion, there is basis for the validity of Section 4.108-1 of RR 7-95. And a "regulation adopted pursuant to law is law."[26] Consequently, it bears emphasis that Section 4.108-1 of RR 7-95 clearly states that the word "zero-rated" must be imprinted on the invoice covering zero-rated sales and that VAT-registered persons must print their TIN followed by the word "VAT" in their invoice or receipts and not simply followed by the letter "V". The Supreme Court has consistently ruled that "where the law speaks in clear and categorical language, there is no occasion for interpretation; there is only room for

[25] *Rollo*, C.T.A. EB No. 426, pp. 71 – 75.
[26] Commissioner of Internal Revenue v. Central Luzon Drug Corporation, G.R. No. 159647, 456 SCRA 441, April 15, 2005.

application".[27] Hence, the duty of this Court is to apply the law and the implementing regulation as worded.

And so does the BIR. To ensure compliance with the invoicing requirements, the BIR came out with a VAT Audit Manual under Revenue Audit Memorandum Order No. 1-99 dated September 5, 1998, the pertinent portion of which reads:

"AUDIT OF VALUE-ADDED TAX LIABILITIES
(Ref. RAMO 1-90 and 1-91, RMO 40-94, RA 7716 and 8424)

A. Preliminary Approach to Investigation

xxx xxx xxx

B. Audit of Sales and Output Tax

1. Gross Taxable Sale of Goods, Properties and Services

xxx xxx xxx

e. Determine compliance with the invoicing requirements and procedures.

e.1 Ascertain that invoices and official receipts bear all necessary information **as required under Sec. 113 (A) and 237 of the NIRC, as amended by Republic Act (RA) 8424, and Sec. 4.108-1 of Revenue Regulations (RR) 7-95.**

e.2 **Check whether the words "zero-rated" are printed on the invoice covering zero-rated sales.** Otherwise, the transaction shall be considered, as taxable since the concerned customer may be able to generate input credit for the transaction.

e.3 Verify authority to print receipts/invoices with the Revenue Regulatory Unit (RRU) of the concerned RDO.

xxx xxx xxx

C. Audit of Purchases and Input Tax

xxx xxx xxx

4. Determine compliance with substantiation on requirements of claims for input tax credit.

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[27] Rizal Commercial Banking Corporation v. Intermediate Appellate Court, G.R. No. 74851, December 9, 1999, 320 SCRA 279, 289, *citing Cebu Portland Cement Co. v. Municipality of Naga, 24 SCRA 708 [1968].*

4.1 **For domestic purchases of goods, properties and services in the course of trade or business, these must be supported by VAT invoices and/or official receipts, showing the information required in Sec. 113 (A) and 237 of the NIRC, as amended by RA 8424, and Sec. 4.108-1 of RR 7-95.** The printer's authority to print must likewise be indicated on the face of the invoice or receipt. A cash register machine tape shall constitute valid proof of input tax credit only if the name and TIN of the purchaser is indicated in the receipt and authenticated by a duly authorized representative of the seller." *(Emphasis supplied)*

In fine, the Court in Division committed no error when it ruled that some of CE Cebu's receipts and invoices violated the invoicing requirements discussed above.

Computation

We shall now move on to the alleged error in computation made by the Court in Division.

CE Cebu submits that the Court in Division erred in its computation of the disallowed input VAT in the amount of ₱1,255,137.31. In computing the said amount, the Court in Division used the ratio of the substantiated zero-rated sales of ₱2,821,754,992.64 to the total reported zero-rated sales per VAT returns of ₱3,109,812,321. In calculating the amount of substantiated zero-rated sales, the Court in Division used the independent CPA's schedule of official receipts issued by CE Cebu to PNOC-EDC when it determined that the total amount of CE Cebu's gross receipts is ₱3,097,418,262.49. However, CE Cebu avers that the Court in Division should have excluded from the gross receipts of ₱3,097,418,262.49 the amounts of ₱7,576,985.52 and ₱140,455.39 since these amounts represent the 4% withholding VAT charged and collected by CE Cebu from PNOC-EDC. The Court in Division

should have used ₱3,089,700,821.58 as the correct amount of gross receipts per schedule of official receipts issued to PNOC-EDC.

In the same manner, CE Cebu avers that the Court in Division should have also reduced the amount of taxable sales from ₱197,001,623.57 to ₱192, 936,022.90, taking into account the 4% withholding VAT charged and collected by CE Cebu from PNOC-EDC amounting to ₱7,576,985.52 and ₱140,455.39.

In its assailed Decision, the Court in Division made the following findings:

> "However, petitioner[28] is not entitled to the full amount applied for due to certain reportorial discrepancies in its zero-rated sales. A comparison of the total amount of zero-rated sales for the Third Quarter of taxable year 2001 to the Fourth Quarter of 2002, as reflected in the Quarterly VAT Returns and Schedule of Official Receipts Issued to PNOC-EDC[29] and the amount supported by petitioner's invoices and official receipts, disclosed the following difference:

Gross Receipts from the Sales of *Generated Power*		**July 1, 2001 to December 31, 2002**
VAT Returns		
Subjected to the 10% VAT	P 192,936,022.90	
Treated as Zero-rated Sales	3,109,812,321.66	P 3,302,748,344.56
Schedule of Official Receipts		3,097,418,262.49
Variance		P 205,330,082.07

> Out of the reported sales per VAT returns in the amount of P3,109,812,321.66, the amount of P3,097,418,262.49 can be used as initial basis in claiming for refund since it is this amount that was substantiated by official receipts. Nonetheless, this amount shall be further reduced because petitioner's documents indicate that some official receipts were not imprinted with the word "zero-rated", in violation of Section 113(A) of the 1997 Tax Code and Section 4.108-1 of Revenue Regulations No. 7-95, which states
>
> xxx xxx xxx
>
> Out of P3,097,418,262.49, the amount of P78,661,646.28[30] shall be deducted because this is supported by official receipts without the word "zero-rated" imprinted thereon. After the deduction, the Court arrives at the amount of P2,821,754,992.64, the computation of which is as follows:

[28] CE Cebu.
[29] *Records*, pp. 665-667, Annex "2" of Exhibit "MM".
[30] *Id.* at p. 665.

Gross Receipts per Schedule of Ors		**P3,097,418,262.49**
Less: Amount Treated as Taxable Sales	**P197,001,623.57**	
Zero-Rated Sales supported by ORs without the word "zero-rated"	78,661,646.28	275,663,269.85
Substantiated Zero-Rated Sales		P2,821,754,992.64 "

(Emphasis supplied)

A review of the records of this case reveals that the amount of ₱197,001,623.57 described as the "Amount Treated as Taxable Sales" in the table above which was deducted from the "Gross Receipts per Schedule of ORs" in the amount of ₱3,097,418,262.49 already includes the 4% withholding VAT charged and collected by CE Cebu from PNOC-EDC amounting to ₱7,576,985.52 under Invoice No. 064.

However, the 4% withholding VAT charged and collected by CE Cebu from PNOC-EDC amounting to ₱140,455.39 as well as the VATable sales amounting to ₱3,511,384.80 under Invoice No. 065 were inadvertently not deducted from the "Gross Receipts per Schedule of ORs" in the amount of ₱3,097,418,262.49, as can be seen in the table below:

Inv No.	Exhibit No.	OR No.	Exhibit No.	4% VAT Collected per OR	6% VAT Withheld	Inv Amount Zero-Rated	Inv Amount VATable Sales	OR Amount
064	Z-1	211, 213, 214, 215	BB-1 to BB-4	7,576,985.52	11,365,478.28		189,424,638.04	197,001,623.57
065	Z-2	216, 217	BB-5 to BB-6			78,661,646.28		78,661,646.28
		218, 219	BB-7 to BB-8			98,412,475.41		98,412,475.41
				140,455.39	210,683.09		3,511,384.80	3,651,840.19
066	Z-3	220, 221, 222	BB-9 to BB-11			180,532,866.54		180,532,866.54
067	Z-4	0001, 0002, 0003	BB-12 to BB-14			182,393,494.72		182,393,494.72
068	Z-5	0004, 0005, 0006	BB-15 to BB-17			144,456,500.72		144,456,500.72
069	Z-6	0008, 0009, 0010	BB-18 to BB-20			180,939,741.24		180,939,741.24

0001	Z-7	0011, 0012, 0013	BB-21 to BB-23			176,920,932.00		176,920,932.00
0002	Z-8	0014, 0015, 0016	BB-24 to BB-26			177,997,176.57		177,997,176.57
0003	Z-9	0017, 0018, 0019	BB-27 to BB-29			175,390,676.82		175,390,676.82
0004	Z-10	0020, 0021, 0022	BB-30 to BB-32			172,997,984.61		172,997,984.61
0005	Z-11	0023, 0024, 0025	BB-33 to BB-35			172,411,644.64		172,411,644.64
0006	Z-12	0026, 0027, 0028	BB-36 to BB-38			172,109,515.35		172,109,515.35
0008	Z-13	0029, 0030, 0031	BB-39 to BB-41			175,585,374.30		175,585,374.30
0009	Z-14	0032, 0033, 0034	BB-42 to BB-44			174,429,367.35		174,429,367.35
0010	Z-15	0035, 0036, 0039	BB-45 to BB-47			177,883,591.65		177,883,591.65
0011	Z-16	0037, 0038, 0040	BB-48 to BB-50			180,621,287.22		180,621,287.22
0012	Z-17	0041, 0042, 0043	BB-51 to BB-53			175,794,178.88		175,794,178.88
0013	Z-18	0044	BB-54			99,226,344.44		99,226,344.44
				7,717,440.91	11,576,161.37	2,896,764,798.74	192,936,022.84	3,097,418,262.50

We are therefore constrained to modify the computation of the amount of CE

CE Cebu's substantiated zero-rated sales as follows:

Gross Receipts per Schedule of Ors		**P3,097,418,262.49**
Less: Amount Treated as Taxable Sales	**P197,001,623.57**	
Zero-Rated Sales supported by ORs without the word "zero-rated"	78,661,646.28	275,663,269.85
Substantiated Zero-Rated Sales		P2,821,754,992.64
Less: 4% VAT collected under Invoice No. 065	*149,455.39*	
Less: VATable Sales under Invoice No. 065	*3,511,384.80*	
Adjusted Substantiated Zero-Rated Sales		**P2,818,103,152.45**

In the respective 2001 and 2002 quarterly VAT Returns, the following sales were declared by CE Cebu:

Exhibit No.	QTR Involved	Zero-Rated Sales	VAT Sales	Total Sales
G	3rd 2001	P 357,606,988.20	P 192,936,022.90	P 550,543,011.10
H	4th 2001	544,278,562.87		544,278,562.87
I	1st 2002	531,476,804.82		531,476,804.82
J	2nd 2002	520,800,306.58		520,800,306.58
K	3rd 2002	522,124,257.00		522,124,257.00
L	4th 2002	633,525,402.19		633,525,402.19
Total		**P 3,109,812,321.66**	**P 192,936,022.90**	**P 3,302,748,344.56**

Thus, out of the reported zero-rated sales of ₱3,109,812,321.66, CE Cebu was able to substantiate only the amount of ₱2,818,103,152.45.

Considering the above adjustment in computation, We shall allocate the substantiated input VAT against the supported zero-rated sales because the input VAT sought to be refunded in the total amount of ₱19,101,021.78 is attributable to declared zero-rated sales of ₱3,109,812,321.66. Inasmuch as only the sum of ₱2,818,103,152.45 was proven as zero-rated sales of generated power to PNOC-EDC, it is but proper to apportion the input VAT equivalent thereto. The rate to be applied will be based on the total amount of declared zero-rated sales, and not based on the total zero-rated sales per official receipts as contended by CE Cebu, *viz*:

Adjusted Substantiated Zero-Rated Sales	₱ 2,818,103,152.45
Divided by total declared zero-rated sales	÷ ₱ 3,109,812,321.66
Rate of supported zero-rated sales	**90.619717879%**

As already computed and discussed in the assailed Decision, the substantiated input VAT amounts to ₱13,550,224.47. Consequently, CE Cebu is entitled to the refund of input taxes attributable to proven zero-rated sales of

generated power to PNOC-EDC in the reduced amount of ₱12,279,175.19, computed as follows:

Substantiated Input VAT	₱ 13,550,224.47
Multiply by Rate of Supported Zero-Rated Sales	x 90.619717879%
Amount Refundable	**₱ 12,279,175.19**

WHEREFORE, premises considered:

1) The Commissioner of Internal Revenue's Petition for Review in C.T.A. EB No. 426 is hereby **PARTIALLY GRANTED.** The assailed Decision dated May 15, 2008 and the Resolution dated October 6, 2008 are hereby **AFFIRMED** with modification as above stated, regarding the computation of the amount refundable to CE Cebu. Accordingly, the Commissioner of Internal Revenue is hereby **ORDERED TO REFUND** or **TO ISSUE A TAX CREDIT CERTIFICATE** in favor of CE Cebu Geothermal Power Company, Inc. the reduced amount of **TWELVE MILLION TWO HUNDRED SEVENTY NINE THOUSAND ONE HUNDRED SEVENTY FIVE PESOS and 19/100 (₱12,279,175.19),** representing the latter's excess and unutilized input VAT for the period covering September 1, 2001 to December 31, 2002.

2) CE Cebu Geothermal Power Company, Inc.'s Petition for Review in C.T.A. EB No. 427 is hereby **DISMISSED.**

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

(With Dissenting Opinion)
ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTANEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of this Court.

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

~versus~

CE CEBU GEOTHERMAL POWER COMPANY, INC,
Respondent.

CTA EB NO. 426
(CTA Case Nos. 6791 & 6836)

x - x

CE CEBU GEOTHERMAL POWER COMPANY, INC,
Petitioner,

~ *versus* ~

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB NO. 427
(CTA Case Nos. 6791 & 6836)

Present:

Acosta, *PJ,*
Castañeda,
Bautista,
Uy,
Casanova, *and*
Palanca-Enriquez, *JJ.*

Promulgated:

MAY 29 2009 9:00 a.m.

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Division[1] denying the parties[2] respective motions for partial reconsideration as regards the Decision of the same Court dated May 15, 2008 for lack of merit. The Court *a quo* partially granted the claim for refund of input tax attributable to zero-rated sales. The Commissioner sought the reversal of the assailed Decision, which ordered him to pay CE Cebu the reduced amount of input tax, when he filed the Petition for Review docketed as CTA EB No. 426. The other Petition for Review docketed as CTA EB No. 427 was filed by CE Cebu questioning the disallowances made by the Court *a quo*; thus, it prayed for the refund of the full amount of its claimed excess and unutililized input tax of P19,101,021.78 covering the period September 1, 2001 to December 31, 2002. Therefore, the common issue presented in this consolidated Petitions for Review is whether or not the Commissioner is liable to pay CE Cebu the full or partial amount of its claim refund.

I believe that the Commissioner is not liable pay CE Cebu a refund either in full or the reduced amount of the latter's claimed excess input tax. I believe that the non-exhaustion of administrative remedies, particularly, the remedy provided under Section 112(D) of the 1997 National Internal Revenue Code (NIRC) is fatal to CE Cebu's claim for refund before the Court *a quo*. At this very point of discussion, it is fitting to state that the issue presented in CTA EB No. 427 becomes moot and academic since CE Cebu is not entitled to a refund.

CE Cebu aptly stated that the Petition for Review (docketed as CTA EB No. 426) is a mere restatement of the Commissioner's contention in his Motion for Partial Reconsideration. Indeed, the Commissioner argued, *among others*, in the said Motion that CE Cebu is not entitled to refund or tax credit for failure to submit at the administrative level all the relevant documents and it should have exhausted the administrative remedies before recourse to the Court was made. In fact, even in his Answer before the Court *a quo*, the Commissioner raised as one of his special

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[1] Herein referred as Court *a quo*.
[2] Considering that both parties are petitioners and respondents at the same time in this Consolidated Petitions for Review, CE Cebu Geothermal Power Company, Inc. shall be referred as "CE Cebu", *for brevity* while the Commissioner of Internal Revenue shall be referred as "Commissioner", *for brevity*.

and affirmative defenses that Section 112(D) of the Tax Code requires the submission of complete documents in support of the application with the BIR before CE Cebu could avail of judicial remedies.

Unfortunately, the said arguments of the Commissioner were not properly appreciated by the Court *a quo* when it ruled that it validly acquired jurisdiction over the case since CE Cebu was able to elevate its claim before the Court thirty days from receipt of the denial of the claim for refund/tax credit or after the expiration of the 120-day period granted to Commissioner to decide on the claim; within two years from payment of the tax or penalty citing Sections 112 and 229 of the 1997 National Internal Revenue Code (NIRC).

It should be pointed out that the Court *a quo* is not clear whether CE Cebu elevated its claim within thirty days from receipt of the denial of the claim or after the expiration of the 120-day period. What is true is that the two Petitions for Review before the Court *a quo* were filed barely one and four days' respectively from CE Cebu's application for refund with the BIR, thus, the 120 day period under Section 112(D) of the 1997 NIRC has not yet lapsed; and there were yet no decision made by the Commissioner on CE Cebu's claims for refund when the petitions were filed in Court. Considering that there was yet no decision of the Commissioner, or even an inaction on the claim since the 120 day period has not yet lapsed, CE Cebu could not yet invoke the appellate jurisdiction of the Court under Section 7 of Republic Act (R.A.) No. 1125 as amended by R.A. No. 9282.

The Court *a quo's* reliance on Section 229 of the 1997 NIRC as a justification in settling the issue of non exhaustion of administrative remedy is erroneous because the said provision of the Tax Code deals with the recovery of tax erroneously or illegally collected, *viz*:

> **SEC. 229.** ***Recovery of Tax Erroneously or Illegally Collected.*** - no suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, of any

> sum alleged to have been excessively or in any manner wrongfully collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
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> In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: *Provided, however,* That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.
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> (Emphasis supplied)

This provision of law has been present even prior to the introduction of the VAT law[3] in our country. Previously it is found in Section 292 of the 1977 NIRC[4]; and Section 243 of the 1987 NIRC.

A distinguished author[5] in the field of taxation noted that for purposes of claims for tax credits or refund of input taxes paid by VAT-registered persons whose transactions are zero-rated or effectively zero-rated, the VAT law specifically provides for the filing of claims within two (2) years after the end of the taxable quarter when the sales transactions were made; and that the two-year prescriptive period within which to file a claim for refund or tax credit of erroneously paid or illegally collected taxes provided in Sections 204 and 229 of the Tax Code do not apply to input VAT claims for refund.

In ***Commissioner of Internal Revenue vs. Mirant Pagbilao Corporation***,[6] the Supreme Court held that the provisions of Sections 204 and 229 set a two-year prescriptive period, reckoned from the date of payment of the tax or penalty, for the filing of a claim of refund or tax credit but both provisions apply only to instances of erroneous payment or illegal collection of internal revenue taxes. In the same case the Supreme Court stressed out the nature of creditable input tax, *viz*:

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[3] Executive Order (EO) No. 273.
[4] Presidential Decree No. 1158.
[5] Law of Basic Taxation in the Philippines by Benjamin B. Aban, Revised Edition, p. 334.
[6] G.R. No. 172129, September 12, 2008 (Supreme Court Third Division). Respondent's Motion for Partial Reconsideration was denied in a Resolution dated November 26, 2008 by the Supreme Court Second Division.

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"For perspective, under Sec. 105 of the NIRC, creditable input VAT is an indirect tax which can be shifted or passed on to the buyer, transferee, or lessee of the goods, properties, or services of the taxpayer. The fact that the subsequent sale or transaction involves a wholly-tax exempt client, resulting in a zero-rated or effectively zero-rated transaction, does not, standing alone, deprive the taxpayer of its right to a refund for any unutilized creditable input VAT, albeit the erroneous, illegal, or wrongful payment angle does not enter the equation."

(Emphasis supplied)

CE Cebu's remedy to claim for refund or tax credits of input tax attributable to zero-rated sales is specifically governed by Section 112 of the 1997 National Internal Revenue Code, *viz*:

"**SEC. 112.** ***Refunds or Tax Credits of Input Tax.*** -

(A) ***Zero-Rated or Effectively Zero-Rated Sales.*** - Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: Provided, however, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (B) and Section 108 (B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): Provided, further, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods of properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales.

(B) ***Capital Goods.*** - A VAT-registered person may apply for the issuance of a tax credit certificate or refund of input taxes paid on capital goods imported or locally purchased, to the extent that such input taxes have not been applied against output taxes. The application may be made only within two (2) years after the close of the taxable quarter when the importation or purchase was made.

(C) ***Cancellation of VAT Registration.*** - A person whose registration has been cancelled due to retirement from or cessation of business, or due to changes in or cessation of status under Section 106(C) of this Code may, within two (2) years from the date of cancellation, apply for the issuance of a tax credit certificate for any unused input tax which may be used in payment of his other internal revenue taxes.

(D) ***Period Within Which Refund or Tax Credit of Input Taxes Shall be Made.*** - In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsections (A) and (B)hereof.

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> In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals.
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> **(E)** ***Manner of Giving Refund.*** - Refunds shall be made upon warrants drawn by the Commissioner or by his duly authorized representative without the necessity of being countersigned by the Chairman, Commission on audit, the provisions of the Administrative Code of 1987 to the contrary notwithstanding: Provided, That refunds under this paragraph shall be subject to post audit by the Commission on Audit."
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> *(Emphasis supplied)*

Unlike Section 229, which provides that the judicial action must be made within the two year prescriptive period, Section 112 provides that a VAT-registered person may **apply** for the issuance of a tax credit certificate or refund of creditable input tax attributable to zero-rated sales within two years after the close of the taxable quarter and that an **appeal** may be made to the CTA within thirty (30) days from receipt of the decision of the Commissioner denying the claim or after the expiration of the one hundred twenty day-period without action on the part of the Commissioner.

I disagree with the view of the majority that the word "may" in paragraph 2 of Section 112(D) means that judicial recourse within thirty days after the lapse of the 120-day period is directory and permissive, and not mandatory or jurisdictional as long as the said period is within the two-year prescriptive period under Section 229 of the NIRC. I firmly believe that the import of the word "may" in the said provisions of the Tax Code is that an appeal to the Court would be totally dependent upon the discretion of the claimant. It's a procedural right extended to the taxpayer which he may or may not exercise based on his judgment. If for instance, he is satisfied with the reason for denial of the claim why would he appeal.

Considering that the wordings of Section 112 are very clear that an administrative application with the BIR for the refund or issuance of tax credit certificate of input tax attributable to zero-rated sales must be made within two-years

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after the close of the taxable quarter when the sales where made and that an appeal may be made to the CTA within thirty days from receipt of the decision of the Commissioner or from his inaction after the lapse of the 120-day period, the Court should therefore make no unnecessary interpretation. It is an elementary rule that when the words and phrases of a statute are clear and unequivocal, their meaning must be determined from the language employed and the statute must be taken to mean exactly what it says.[7] Thus, what is not clearly provided in the law cannot be extended to those matters outside its scope.[8]

CE Cebu's reliance in the case of ***Gibbs vs. Collector***,[9] wherein it was ruled that when the two-year prescriptive period is about to prescribe and the claim for refund with the BIR has not been acted upon, the taxpayer should file a Petition for Review with the CTA within the two-year prescriptive period, otherwise, if the decision of the BIR is adverse and it was made after the two-year period, the taxpayer can no longer appeal the same to the CTA, is misplaced. The said decision came into existence before the advent of the VAT law under Executive Order (EO) No. 273 (which took effect on January 1, 1988), as amended by Republic Act (RA) No. 7716 (approved on May 5, 1994); RA 8424 (which took effect on January 1, 1998); and RA 9337 (which took effect on July 1, 2005).

In ***Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue***,[10] the Supreme Court was confronted with the issue of prescription as regards the refund of input VAT for taxable year 1990 to 1992. In the said case the Supreme Court held:

> "It is already well-settled that the two-year prescriptive period for instituting a suit or proceeding for recovery of corporate income tax erroneously or illegally paid under Section 230 of the Tax Code of 1977, as amended, was to be counted from the filing of the final adjustment return. This Court already set out in ACCRA Investments Corporation v. Court of Appeals, the rationale for such rule, thus – xxx

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[7] Binay vs. Sandiganbayan, G.R. No. 120681-83, October 1, 1999.
[8] Statutory Construction by Ruben Agpalo, Fifth Ed. (2003), page 125.
[9] GR No. L-13453, February 29, 1960 (107 Phil 232).
[10] G.R. Nos. 141104 & 148763, June 8, 2007.

> The very same reasons set forth in the afore-cited cases concerning the two-year prescriptive period for claims for refund of illegally or erroneously collected income tax may also apply to the Petitions at bar involving the same prescriptive period for claims for refund/credit of input VAT on zero-rated sales."

It should be noted, however, that the decision of the Supreme Court in the said ***Atlas*** case is based on EO 273 and the 1977 NIRC. Unlike Section 112 of the 1997 National Internal Revenue Code, Section 106 of EO No. 273 – the original VAT law, which is the older provisions for refund of input tax, does not provide for a period within which to appeal to the CTA. Thus, in the ***Atlas*** case, the Supreme Court applied Section 230 (now 229) of the Tax Code and held that the two-year prescriptive period for claims for refund of illegally or erroneously collected tax may also apply to the Petition involving claims for refund/credit of input tax. The said jurisprudence finds no application to the present case due to the categorical language of Section 112, particularly paragraph 2 of subsection D of the 1997 NIRC.

Therefore, as mandated by Section 112 (D) of the 1997 NIRC, CE Cebu should have waited the Commissioner to decide on his claim or at most the lapse of the 120 day period before filing the Petitions for Review (docketed as CTA Case No. 6791 & 6836) with the Court *a quo*. Worthy to emphasize that a correct decision on one's claim could be reached when all the relevant documents are submitted with the Commissioner who has the primary jurisdiction to determine the propriety of the claim. In one case,[11] the Supreme Court had the occasion to rule on the nature of the proceedings in the Court of Tax Appeals, *viz*:

> "Petitioner's contention that non-compliance with Revenue Regulations 3-88 could not have adversely affected its case in the CTA indicates a failure on its part to appreciate the nature of the proceedings in that court. First, a judicial claim for refund or tax credit in the CTA is by no means an original action but rather an appeal by way of petition for review of a previous, unsuccessful administrative claim. Therefore, as in every appeal or petition for review, a petitioner has to convince the appellate court that the quasi-judicial agency a quo did not have any reason to deny its claims. In this case, it was necessary for petitioner to show the CTA not only that it was entitled under substantive law to the grant of its claims but also that it satisfied all the documentary and evidentiary requirements for an

[11] Atlas Consolidated Mining and Development Corporation vs. Commissioner of Internal Revenue, G.R. No. 145526, March 16, 2007.

> administrative claim for refund or tax credit. Second, cases filed in the CTA are litigated de novo. Thus, a petitioner should prove every minute aspect of its case by presenting, formally offering and submitting its evidence to the CTA. Since it is crucial for a petitioner in a judicial claim for refund or tax credit to show that its administrative claim should have been granted in the first place, part of the evidence to be submitted to the CTA must necessarily include whatever is required from the successful prosecution of an administrative claim."

Thus, CE Cebu's immediate recourse to the Court without observing the procedure set out in Section 112(D), particularly, by waiting the decision of the Commissioner or at most for the lapse of the 120 day period before filing the Petitions for Review (CTA Case Nos. 6791 & 6836), is a clear violation of the rule on exhaustion of administrative remedies.

The rule on exhaustion of administrative remedies before resorting to the court means that there should be an orderly procedure which favors a preliminary administrative sifting process, particularly with respect to matters peculiarly within the competence of the administrative agency, avoidance of interference with functions of the administrative agency by withholding judicial action until the administrative process has run its cause, and prevention of attempts to swamp the courts by a resort to them in the first instance.[12]

A party seeking an administrative remedy must not merely initiate the prescribed administrative procedure to obtain relief, but also pursue it to its appropriate conclusion before seeking judicial intervention in order to give the administrative agency an opportunity to decide the matter itself correctly and prevent unnecessary and premature resort to court action.[13] The non exhaustion of administrative remedies renders the action premature, *i.e.*, the claimed cause of action is not ripe for judicial determination and for that reason a party has no cause of action to ventilate in court.[14] The premature invocation of the court's intervention is fatal to one's cause of action; and absent any finding of waiver or estoppel, *like the*

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[12] Abe-Abe vs. Manta, L-4827, May 31, 1979; 90 SCRA 524.
[13] Commissioner of Internal Revenue vs. Rosemarie Acosta, G.R. No. 154068, August 3, 2007.
[14] Carale vs. Abarintos, G.R. No. 120704, March 3, 1997.

present case, the case is susceptible of dismissal for failure to state a cause of action.[15]

I disagree with the majority in upholding the ruling of the Court *a quo* that CE Cebu's pre-mature resort to Court is justified due to the fact that the two-year prescriptive period provided under Section 229 of the NIRC will already expire, citing as basis two exceptions to the principle of exhaustion of administrative remedies, namely: there is urgency for judicial intervention and irreparable damage will be suffered. Indeed, it is not amiss to state that the principle of exhaustion of administrative remedies is not an ironclad rule. This doctrine is a relative one and its flexibility is called upon by the peculiarity and uniqueness of the factual and circumstantial settings of a case. Hence, it is disregarded (1) when there is a violation of due process, (2) when the issue involved is purely a legal question, (3) when the administrative actions is patently illegal amounting to lack or excess of jurisdiction, (4) when there is estoppel on the part of the administrative agency concerned, (5) when there is irreparable injury, (6) when the respondent is a department secretary whose acts as an *alter ego* of the President bears the implied and assumed approval of the latter, (7) when to require exhaustion of administrative remedies would be unreasonable, (8) when it would amount to a nullification of a claim, (9) when the subject matter is a private land in land case proceedings, (10) when the rule does not provide a plain, speedy and adequate remedy, and (11) when there are circumstances indicating the urgency of judicial intervention.[16] Based on these exceptional cases mentioned by the High Court, not one could be used as basis in CE Cebu's immediate resort to the Court.

The Court *a quo* should have dismissed the Petitions for Review (docketed as CTA Case No. 6791 & 6836) for failure to state a cause of action. Said court erred when it entertained the case and ultimately decided that CE Cebu is entitled to a

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[15] Commissioner of Internal Revenue vs. Rosemarie Acosta, *supra*.
[16] Paat vs. Court of Appeals, G.R. No. 111107, January 10, 1997.

refund. The said Court's only jurisdiction then is to dismiss the Petition for failure to state a cause of action.

While I am in favor of granting the Commissioner's Petition for Review *(docketed as CTA EB No. 426)* to reverse and set aside the decision of the Court *a quo*, I, however, want to register for academic purposes my disagreement with regard to the majority view (in response to the issue presented in CTA EB No. 427) that the invoices or official receipts without the imprinted word "zero-rated" as well as those with "TIN-V" only and not "TIN-VAT should be disregarded and invalidated as supporting documents; and as a consequence, the claimed input tax attributable thereto will be denied for violating the substantiation requirement under Section 4.108-1 of Revenue Regulations No. 7-95.

Contrary to this, the significant provisions of the National Internal Revenue Code (NIRC), namely, Section 113, in relation to Section 237, only require the following information to appear in an invoice or official receipt:

(1) A statement that the seller is a VAT-registered person;
(2) The taxpayers identification number (TIN);
(3) The total amount which the purchaser pays or is obligated to pay to the seller indicating the inclusion of the value-added tax;
(4) Transaction date;
(5) Quantity of merchandise;
(6) Description of merchandise or nature of service;
(7) Unit cost;
(8) The name, business style, if any, and address of the purchaser, customer or client in the case of sales, receipts or transfers in the amount of One hundred pesos (P100.00) or more, or regardless of amount, where the sale or transfer is made by a person liable to value-added tax to another person also liable to value-added tax; or where the receipt is issued to cover payment made as rentals, commissions, compensations or fees; and
(9) The TIN of the VAT-registered purchaser.

This has been confirmed in the landmark case of ***Intel Technology Philippines vs. Commissioner of Internal Revenue,***[17] where the Supreme Court held that only the following items are required to be indicated in the receipts or invoices, namely: (1) a statement that the seller is a VAT-registered entity followed by its

[17] G.R. No. 166732, April 27, 2007.

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TIN-V; (2) the total amount which the purchaser pays or is obligated to pay to the seller with the indication that such amount includes the value-added tax; (3) date of the transaction; (4) quantity of merchandise; (5) unit cost; (6) description of merchandise or nature of service; (7) the name, business style, if any, and address of the purchaser, customer or client in the case of sales, receipt or transfers in the amount of ₱100.00 or more, or regardless of the amount, where the sale or transfer is made by a person liable to VAT to another person also liable to VAT, or where the receipt is issued to cover payment made as rentals, commissions, compensations or fees; and (8) the TIN of the purchaser where the purchaser is a VAT-registered person.

Apparently, the applicable provisions of the NIRC, as well as the jurisprudence, does not require the word "zero-rated" to be imprinted in the invoice or official receipt. Requiring that the official receipts or sales invoices of the taxpayer should bear the word "zero-rated" would be adding a condition that is not plainly written under the law.

The lone provision requiring the imprinting of the term "zero-rated" on the VAT invoice is Section 4.108-1 of Revenue Regulations No. 7-95.[18] However, the said provision is merely a regulation created for the sole and limited purpose of implementing a very exact law. Settled is the rule that administrative rules and regulations cannot expand the letter and spirit of the law they seek to enforce. And in case of conflict between the basic law and a rule or regulation issued to implement said law, the law prevails because said rule or regulation cannot go beyond the terms and provisions of the basic law.[19] The imprinting of the word "zero-rated" in the official receipts and invoices is an additional requirement which cannot be allowed to be imposed by a mere administrative regulation. It can only be imposed by a law. Republic Act No. 9337[20] introduced the writing or printing the term "zero-rated sale"

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[18] The Implementing Rules and Regulations of the VAT law.
[19] People vs. Lim, 108 Phil. 1091.
[20] Supposedly, effective July 1, 2005 but its constitutional validity was upheld by the Supreme Court in the Decision dated September 1, 2005. Said law amended, among others, Section 113 of the NIRC.

in the invoice or receipt, but said law cannot apply retroactively so as to prejudice a taxpayer, given the well-entrenched principle that statutes, including administrative rules and regulations operate prospectively only, unless the legislative intent to the contrary is manifest by express terms or by necessary implication.[21]

On the other hand, while it is undisputed that the words "TIN, and "VAT" or any indication to that effect is required to be indicated in the invoice or receipt, nevertheless, their absence could not mean that the invoice or receipt will be invalidated.

In the ***Intel*** case,[22] the Supreme Court held that the provisions of law (referring to Sections 113, 237 and 238 of the NIRC) and revenue regulations neither provide that failure to reflect or indicate in the invoices or receipts the BIR authority to print, as well as the TIN-V, would result in the outright invalidation of these invoices or receipts, nor, is it provided therein that such omission or failure would result in the outright denial of a claim for tax credit/refund; but instead Section 264 of the Tax Code imposes the penalty of fine and imprisonment for, among others, invoices or receipts that do not truly reflect or contain all the required information.

Though the issue in the ***Intel*** case is the outright invalidation of invoices or official receipts for the non-indication of the BIR authority to print, and the TIN-V, it, however, applies by analogy to the issue presented in CTA EB No. 427. The applicable laws likewise do not provide for the absolute denial of the claim for tax credit/refund for failure to imprint the term "zero-rated" and "TIN-VAT" on the invoices or official receipts.

WHEREFORE, while I disagree with the opinion of the majority denying portion of the claim due to substantiation requirement, which denial has no basis in law and jurisprudence, however, the same could not help CE Cebu Geothermal Power Company, Inc. considering that it pre-maturely invoked the Court *a quo*'s

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[21] BPI Leasing Corporation vs. The Honorable Court of Appeals, G.R. No. 127624, November 18, 2003.
[22] Supra.

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jurisdiction by filing its case (CTA Case Nos. 6791 & 6836) without observing the 120-day period pursuant to Section 112(D) of the NIRC. Said Court's jurisdiction then is to dismiss the Petition for Review for lack of cause of action. Therefore, I vote to grant the Petition for Review filed by the Commissioner docketed as CTA EB No. 426, and to deny the Petition for Review filed by CE Cebu docketed as CTA EB No. 427.

ERNESTO D. ACOSTA
Presiding Justice